building contract have been completed and is valued at $11,288,727.77. He further submits that the sum of $572,729.91 certified as payable by the penultimate payment certificate is the difference between "net value of works and materials to date" and the total amount paid to the contractor under previous interim payment certificates and that the penultimate payment certificate can be nothing less than and is in fact a Final Certificate, though in the form of an interim certificate of payment and that it is called a Penultimate Certificate patently to avoid the implications of Clause 30(7) and the arbitration clause, Clause 34.

I cannot accept Mr. Karthigesu's submissions. It is plain that a payment certificate cannot be a Final Certificate unless the architect intends it to be the Final Certificate and the architects' letter of December 1, 1983 stating, *inter alia*, that "We have decided that a penultimate certificate be issued" clearly shows that the architects did not intend the penultimate certificate of December 6, 1983 to be the Final Certificate under the contract.

Another submission advanced by Mr. Karthigesu is that the employer challenges that "even the $572,929.91 is due" and asserts that the whole of the final measurement and valuation is in dispute. The only basis to support the assertion that there is a dispute is the employer's contention that the project quantity surveyor, who is the employer's own quantity surveyor, had over measured or that the employer's own architects had over certified. No evidence has been produced, nor any explanation offered, to substantiate that contention and I am of the opinion that there is no real basis for that contention to warrant a stay of proceedings.

I accept Mr. Wu's submission that the term "penultimate" used by the architects in the Certificate of Payment dated December 6, 1983 means the last but one certificate under the contract and that the certificate dated December 6, 1983 is an interim payment certificate governed by Clause 30(1) of the building contract. Accordingly, I allow the appeal and dismiss the employer's application for stay of these proceedings with costs in any event.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Cooma Lau, Loh & Karthigesu, Gupta & Sam.*

HEISAN B.V. v. GIH INVESTMENT PTE. LTD.

[O.C.J. (Chua J.) November 4, 1986]

[Singapore – Originating Summons No. 811 of 1986]

Land Law – Strata Title – Sale and purchase agreement – Outgoings to be discharged by vendor before completion – Renovations and repairs to building – Whether "outgoing" prior to completion – Whether purchasers liable to pay.

Management Corporation – Renovations and repairs to building done by management corporation before completion of sale and purchase agreement – Whether "outgoing" payable by purchasers – Land Titles (Strata) Act (Cap. 277, 1970 Ed.), s. 34.

Strata Title – Management corporation – Renovations and repairs to buildings done by management corporation before completion of sale and purchase agreement – Whether "outgoing" payable by purchasers – Land Titles (Strata) Act (Cap. 277, 1970 Ed.), s.34.

In this case, by a sale and purchase agreement dated March 3, 1986, the defendants sold to the plaintiffs the property known as #15-01 to #15-12 UIC Building. By clause 9 of the said agreement, it was provided that the sale and purchase was to be subject to the Singapore Law Society's Conditions of Sale 1981, clause 6 of which provides that the outgoings will be discharged by vendor down to but excluding the date fixed for completion.

The plaintiffs' solicitors, in the course of their requisitions, received a reply dated May 3, 1986, from the Management Corporation Strata Title No. 360 responsible for the UIC Building ("the Building"). The reply stated, *inter alia*, that the Management Corporation was currently performing renovations and repairs to the Building, the costs of which were estimated at $9 million.

The parties have worked out the contribution of the said property for the renovations and repairs for the Building and have set aside a sum of approximately $220,000 and completed the sale and purchase on May 30, 1986, without prejudice to the rights of the parties to seek the declaration of the court as to who was liable to pay the $220,000.

The question which arose for determination in this case was whether the defendants were under any liability, prior to the completion of the said agreement, to contribute towards the renovations and repairs to the Building which were being carried out by the Management Corporation.

Held: (1) the renovations and repairs to the Building were commenced before May 3, 1986, even before the plaintiffs wrote to the Management Corporation and well before the date of completion of the said agreement. It is clear that by section 34(3)(b) read with section 34(5), the defendants had already incurred liability before the completion of the said agreement notwithstanding that no contribution had been levied under section 34(5) as the Management Corporation's expenditure would ultimately be borne by the subsidiary proprietors;

(2) the costs of the renovation and repair works to be apportioned to the subsidiary proprietor of the said property is an outgoing prior to the completion of the said agreement and is payable by the defendants.

Cases referred to:

(1) *Goodyear Investments Pte. Ltd.* v. *Lalwani* [1980] 1 M.L.J. 268, 272.
(2) *Tubbs* v. *Wynne* [1897] 1 Q.B. 74.
(3) *Re Waterhouse's Contract* 44 Sol. J. 645.

ORIGINATING SUMMONS.

Wong Meng Yeng for the plaintiffs.
Woo Bih Li for the defendants.

Cur. Adv. Vult.

Chua J.: By this Originating Summons the plaintiffs seek a declaration "(1) that the share of the subsidiary proprietor of the property known as # 15-01 to # 15-12 UIC Building, Singapore, for the cost of the renovation and repair works undertaken by the Management Corporation shall be borne by the defendants; (2) that the plaintiffs are entitled to retain a sum of $220,000 or such sum as this Honourable Court may determine to meet such costs."

The facts are these. By a sale and purchase agreement dated March 3, 1986, ("the said agreement"), the defendants sold to the plaintiffs the property known as # 15-01 to # 15-12 UIC Building, Singapore ("the said property").

By Clause 9 of the said agreement it was provided that the sale and purchase was to be subject to the Singapore Law Society's Conditions of Sale 1981, Clause 6 of which provides that the outgoings will be discharged by the Vendor down to but excluding the date fixed for completion.

The plaintiffs' solicitors, in the course of their requisitions, received a reply dated May 3, 1986, from the Management Corporation Strata Title No. 360 responsible for the UIC Building ("the Building") (WMY-2). The reply stated, *inter alia*, that the Management Corporation was currently performing renovations and repairs to the Building, the costs of which were estimated at $9 million and that the $9 million was to be financed by a loan of $5.3 million upon any security which the Management Corporation was authorised to give and by utilising a sum not exceeding $3.7 million from the funds present or future in the Management Fund and the Sinking Fund of the Management Corporation.

The resolution approving the said renovation and repair works was passed on January 15, 1985 at the Extraordinary General Meeting of the Management Corporation.

Every unit in the Building is attributed a certain number of shares upon which its contribution is calculated. The said property is attributed 92 shares out of 3907 shares. The parties have worked out the contribution of the said property for the $9 million estimated expenditure for the renovations and repairs for the Building and have set aside a sum of approximately $220,000.00 and completed the sale and purchase on May 30, 1986, without prejudice to the rights of the parties to seek the declaration of the Court as to who is liable to pay the $220,000.00.

It is the contention of the plaintiffs that the said renovation and repair works, which was commenced some time before May 3, 1986, prior to the completion of the said agreement, is a liability to be incurred by the defendants who were the incumbent subsidiary proprietors and that such expenditure of the Management Corporation, which will be borne by the subsidiary proprietors, is an outgoing prior to the completion of the said agreement and should accordingly be borne by the defendants.

The plaintiffs based their contention that it is an "outgoing" (1) on the basis that the works commenced before the completion of the said agreement on May 30, 1986, (2) on the strength of the Management Corporation's letter of May 3, 1986, where it states that the estimated amount of expenditure is $9 million and this is in reference to section 34(4)(f) of the Land Titles (Strata) Act; and (3) on the definition of "outgoing" in the case of *Goodyear Investments Pte. Ltd.* v. *Lalwani*.[1] The plaintiffs contend that the defendants had already incurred liability before completion of the said agreement as the Management Corporation's expenditure would ultimately be borne by the respective subsidiary proprietors.

The defendants submit that the entire action is wrong and the prayers are also wrong. The argument of counsel for the defendants is this. He says that prayer (1) is wrong for the following reasons: (1) It makes reference to the subsidiary proprietor of the property without defining which subsidiary proprietor is concerned in this action; is it all the past subsidiary proprietors or only the present; (2) It refers to the costs of the renovation and repair works without identifying the works by re-

ference to any resolution whatsoever; (3) It refers to the Management Corporation; there is no such entity as "the Management Corporation." The entity concerned should be the Management Corporation Strata Title No. 360; (4) It suggests that the defendants are to pay for the costs to the relevant Management Corporation direct; this cannot be because the relevant Management Corporation is not a party to these proceedings and therefore cannot derive any direct benefit on these proceedings.

Counsel for the defendants says that the correct application should have been for an indemnity from the defendants to the plaintiffs for such liabilities as they may incur in relation to the costs of the renovation and repair works referred to in the resolution of January 15, 1985 and paragraph (e) of WMY-2.

There is no substance in this submission. The subsidiary proprietor is sufficiently identified by reference to the units concerned, # 15-01 to # 15-12 UIC Building, and so is the Management Corporation. A sum has been set aside that the subsidiary proprietor would be liable for and that amount, $220,000.00, has been set out in prayer (2).

The application and the prayers are in order.

The term "outgoing" is of very wide import. In *Emmet* on Title (18th Ed) the following paragraph appears (at p. 237):

> *"Liability for outgoings* – Under an open contact, the vendor must bear all expenses and outgoings which are a charge on the property, down to the time when a good title to the property is first made out, and, as from that time, all such expenses and outgoings must be borne by the purchaser ... Where the contract fixes a date for completion, but otherwise the contract is an open one, the vendor is similarly liable up to the time fixed for completion ... But where such expenses and outgoings are not a charge on the property but are merely recoverable by suing the owner thereof for the time being personally, the vendor ought to pay them if they fall due before the time for completion ...; and in some circumstances the purchaser may be entitled to refuse to complete until such outgoings are paid."

In *Tubbs* v. *Wynne*[2] the contract for the sale of the land and building was entered into on March 30, 1893. The date fixed for completion was May 8, 1893. It was provided in the contract that all outgoings up to the date of completion being cleared by the vendor. In January 1893, before the date of the contract, a notice to pull down certain buildings on the land in question, which had been certified as dangerous structures, was given to the vendor by the London County Council. The vendor failed to comply with the notice and a summons was taken out to compel compliance with the notice. At the adjourned hearing of the summons on April 11, 1893, the vendor consented to an order to pull down the buildings within twenty-eight days. After May 8, 1893, the buildings not having been pulled down, the London County Council gave orders to their contractors to pull them down, which was done. The London County Council then demanded from the purchaser the expenses incurred in pulling down the buildings, which the purchaser paid to them. The purchaser contended that these expenses were recoverable by the purchaser as "outgoings." It was held by the court that the liability having been incurred before May 8, the expenses were "outgoings" within the meaning of the conditions, which the purchaser was entitled to recover from the vendor.

In *Re Waterhouse's Contract*,[3] the contract for sale was entered into on July 1, 1898; the completion was to be on September 29, 1898; and down to which time all outgoings were to be paid by the vendor. On July 26, 1898, the vendor was served a notice by the district council under the Public Health Act to sewer, level and make up the street in which the premises were situate within one month. The purchaser called on the vendor to comply with the notice and claimed that the expense of making up the road was an outgoing to be paid by the vendor; but this the vendor denied and the notice was not complied with. The district council accordingly itself made up the road but after September 29, 1898, and apportioned the sum to be paid in respect of the premises sold. The correctness of the apportionment was not disputed. The purchaser contended that this sum was an outgoing which, though not ascertained as to exact amount until after September 29, was created so far as the liability to pay it was concerned before that date. Bryne J. said that the Public Health Act did not confer on the owner of the premises a liability to do the work required by the district council, but gave him the opportunity of doing it himself. If he did not do it himself then the district council might do it, and when it was done by the district council a charge was made for work so done. The purchaser failed in his application as liability did not arise until the completion of the work by the district council.

In *Goodyear Investments Pte Ltd* v. *Lalwani*, Rajah J. said (p. 272):

"For there to be an outgoing, either the vendor must have incurred a liability or expense or a local or other authority must have incurred an expense in respect of the property before the date fixed for completion of the sale."

The question which arises for determination in this case is whether the defendants were under any liability, prior to the completion of the said agreement, to contribute towards the renovations and repairs to the Building which were being carried out by the Management Corporation.

Under section 34(1) of the Land Titles (Strata) Act, the management corporation is required to establish a fund for administrative expenses, referred to as 'the management fund," for the purpose, *inter alia,* of managing and administering the common property.

Under section 34(3), for the purpose of establishing and maintaining the management fund the management corporation may, *inter alia,* at a general meeting:–

(a) determine from time to time the amounts to be raised for the purposes mentioned in subsection (1) of this section;

(b) raise the amounts so determined by levying contributions on the subsidiary proprietors in proportion to the share units of their respective lots.

Section 34(5) provides that

"any contribution levied under subsection (3) of this section in respect of a lot is due and payable on the passing of a resolution to that effect by the management corporation, and in accordance with the terms of that resolution, and may be recovered as a civil debt from a subsidiary proprietor of, or his successor in title to, the lot."

The resolution passed by the Management Corporation on January 15, 1985, was that the Council or Management Agent was authorised to undertake feasibility studies on the repairs and renovations and finance the undertaking of the works by obtaining loan or loans not exceeding $5,300,000.00 and by utilising a sum not exceeding $3,700,000.00 from the funds in the general management fund and the sinking fund of the Management Corporation.

Counsel for the defendants says that there is no resolution by the Management Corporation to levy contributions pursuant to section 34(3)(b) on the subsidiary proprietors at or prior to the date of completion of the said agreement. He submits that there was no liability whatsoever on the defendants prior to the completion of the said agreement and even until today and therefore there was no outgoing prior to the completion of the said agreement.

I am unable to accede to that submission.

The Management Corporation has incurred a liability in that the renovations and repairs to the Building have commenced prior to the completion of the said agreement. When the plaintiffs as a prospective purchaser wrote to the Management Corporation pursuant to section 34(4), the Management Corporation was obliged to issue to the plaintiffs a certificate certifying, *inter alia,* whether or not the Management Corporation has incurred any expenditure or performed or is about to perform any repairs, work or act in respect of which a liability is likely to be incurred by the subsidiary proprietor under any provisions of Part IV (Management of the Building and the Management Corporation) and, if so, the estimated amount of the expenditure or the general nature of the repairs, work or act. The subsection provides that

"as against the management corporation and in favour of any person (including the member) relying in good faith on such certificate, that certificate shall be conclusive evidence of the matters certified therein."

The renovations and repairs to the Building were commenced before May 3, 1986, even before the plaintiffs wrote to the Management Corporation and well before the date of completion of the said agreement. It is clear that by section 34(3)(b) read with section 34(5), the defendants have already incurred liability before the completion of the said agreement notwithstanding that no contribution has been levied under section 34(5) as the Management Corporation's expenditure would ultimately be borne by the subsidiary proprietors.

The costs of the renovation and repair works to be apportioned to the subsidiary proprietor of the said property is an outgoing prior to the completion of the said agreement and is payable by the defendants.

There will be declarations in terms of prayers (1) and (2) of the Originating Summons.

The plaintiffs have not prayed for costs. There will be no order as to costs.

Order accordingly.

Solicitors: *Netto Low Abraham & Partners; Allen & Gledhill.*